

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

FRED MEYER, INC.

Employer

and

Case 36-RC-6074

UNITED FOOD & COMMERCIAL WORKERS  
UNION, LOCAL 555, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining with the meaning of Section 9(b) of the Act:

All meat cutters, meat wrappers, and seafood counter clerks employed by the Employer at its Tillamook, Oregon, facility; but excluding all office clerical employees, guards and supervisors as defined by the Act (including Meat Department and Seafood Department Managers), and all other employees.

The Employer is engaged in the operation of a chain of retail grocery and general merchandise stores, including its store located in Tillamook, Oregon, the only facility involved herein. The parties stipulated that the appropriate unit includes all meat cutters, meat wrappers,

and seafood counter clerks. The Employer contends that the meat manager and the seafood manager are statutory supervisors, the sole issue involved herein.

The meat and seafood departments report to Jerry Parker, the food manager, who in turn reports to the store director. The Tillamook store opened in about February 1996. Parker has been the food manager for about two years. He is responsible for the pharmacy, health and beauty care, "hanging" deli, service deli, nutrition, grocery, bakery, produce, meat and seafood departments.

The meat manager is Chris Rockwood, who has been in that position since about September 1999. In addition to Rockwood, there are three employees in the meat department. The seafood manager is Delisa Averill. She has been in the position since the store opened. In addition to Averill, there are two employees in seafood.

Rockwood and Averill are each responsible for ordering and for maintaining the profit margin of their respective departments. In addition to Parker, their departments are overseen to some extent by Bruce Albertson, the Employer's regional meat supervisor, who works in an office in the Employer's headquarters in Portland. Albertson provides Rockwood and Averill with schematics for displaying merchandise in the cases, pricing information, and other merchandising information and "guidance".

Rockwood and Averill schedule the employees in their departments on a weekly basis. They are assigned a specific number of hours for each week, generally 144 hours in meat and 98 hours in seafood, with an additional three or four hours for inventory week, which occurs every four weeks. The hours are set by corporate policy. In addition, Rockwood at least can add more hours according to a formula based on sales. Rockwood and Averill prepare the schedules on a weekly basis, and submit them to the corporate office after they have been reviewed by Food Manager Parker. Rockwood initially handwrites his schedule, and later posts the handwritten schedule in the meat department. If the sales volume at the beginning of the week is high, and he estimates that the department will exceed \$23,000 in the week, he can and does add four hours for every additional \$1000 he expects during the rest of the week.

Meat employees do not necessarily work the same hours or have the same days off every week, although full-time employees are always scheduled for 40 hours, and part-time employees are scheduled for their guaranteed number of hours, such as 24 or 32, each week. Rockwood can independently grant an employee a requested day off, although Parker's approval is required if the day off is to be with pay. Rockwood can also call an employee in to work on a scheduled day off. Employees who wish to trade shifts with each other must have Rockwood's permission to do so.

Employees in Averill's department are generally scheduled for the same hours and days off from week to week. Averill can independently make changes in the schedule if she wishes, and can independently grant employees unpaid time off. Averill said that she schedules the other employees in her department to suit her own convenience. For example, she sings at weddings and therefore does not schedule herself to work on Saturdays.

The Employer has an established hiring procedure. Applications are submitted to the key screening person, Mark Collins, who gives the applicants a screening test and interview. If he decides the applicant would be a good employee, he arranges for them to be interviewed by the relevant department manager. The department manager interviews the applicant, using a pre-

determined list of questions, and then advises Collins whether to hire the applicant. Both Rockwood and Averill attended special training on hiring procedures.

Turnover in the meat department is very low. It appears that the only employee who has been hired into that department since Rockwood became manager was John White. White initially contacted the Employer's corporate office about a job, and was interviewed there by Bruce Albertson. He was later briefly interviewed by Rockwood and Parker, but it appears that he had already been hired by Albertson at the time he talked to Rockwood and Parker. Rockwood testified that he has never been told he has authority to hire, and said that he believes that hiring is done by Albertson.

Averill has interviewed applicants. She customarily does so in the presence of Parker. Averill asks the required questions. After the interview, she and Parker discuss the applicant, and in the examples in the record, including one in which there were two applicants for the same opening, Averill told Parker she wanted to hire a particular person, and that individual was hired. Both Averill and Parker testified that it is Averill's decision whether a particular individual should be hired or not. Averill also testified that sometimes Parker conducts the interviews in her absence, and makes the decision. This is because she has no control over the time and date of the interview - arranged by Collins - and sometimes is not available. There is a fairly high turnover in the seafood department.

Sharon Rainey, the service deli manager, a position roughly equivalent to that of Rockwood and Averill, testified that she has hired about 10 employees for her department over the past three years. She said that she interviewed them by herself, and if she wanted to hire them, she told them at the conclusion of the interview that they were hired.

Rockwood testified that there have not been any occasions for discipline in his department since he became manager. Averill was involved in disciplining employee Sandra Neimi. She verbally counseled Neimi, and a written record was kept of such counseling, in accordance with the Employer's progressive disciplinary policy. On one occasion, Neimi was insubordinate to a rather extreme degree. Averill discussed the situation with Parker, who administered a written warning.<sup>1</sup> A short time later, Neimi was involved in a confrontation with an employee in another department, involving purported threats by Neimi. At the time, Averill told Parker that Neimi should be fired. Parker administered a three-day suspension, and Neimi was moved to another department.

Averill has recommended that employee Susi Stacks receive a merit pay increase. The recommendation has not yet been approved by higher authority (in the corporate offices.) Both Rockwood and Averill can choose which employee they want to be their second-in-command, but there is no evidence that such choice grants the employee any benefit, such as a wage increase.

Both Rockwood and Averill can assign specific tasks to employees. Rockwood testified that the meat employees are all very experienced and do not require any day-to-day direction. Jeanne Allen has been employed as a meat cutter since August 1996. She testified that she sometimes disagrees with Rockwood about how things should be done, but that she is obliged to follow his instructions. It appears that the seafood employees also require little day-to-day direction, and, indeed, Averill is generally not present when one or the other of the seafood employees is working.

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<sup>1</sup> Parker testified that department managers cannot issue written warnings.

The Employer has an established complaint resolution procedure, published in its employee handbook, which provides that employees with complaints first go to their department supervisor. Averill testified that recently an employee approached her regarding problems related to her breaks, and Averill resolved the problem.

The Employer offered extensive evidence that Rockwood and Averill evaluate employees. However, there is no evidence that the performance appraisals have any effect on employees' terms and conditions of employment.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

With respect to hiring, job candidates who have been pre-screened by the key screening person are interviewed by the relevant department manager, who has the authority to accept or reject the applicant. The record establishes that this is the Employer's procedure. The record also establishes that such procedure is not always followed. For example, White was hired into the meat department by the regional meat specialist in Portland. Parker has sometimes interviewed and hired applicants for positions in the seafood department, in Averill's absence. The authority of the department managers to hire employees is not negated by such variations. Clearly, Averill has authority to hire and has hired employees. There is evidence that other department managers have independently hired employees. I conclude that the meat manager and seafood manager have authority to hire employees,<sup>2</sup> and that such action requires independent judgment. This, alone, suffices to establish supervisory authority.

With respect to "responsible direction", I note that both Rockwood and Averill are responsible for ordering and for maintaining the profit margin of their departments. Employees are expected to follow their instructions; and one is deemed insubordinate and subject to discipline if he does not. The managers are the Employer's complaint adjustment representatives in the first instance. The department managers have the authority to adjust schedules as they see fit (within the labor budget, established largely by formulas), the meat manager choosing to do so less frequently than the seafood manager.<sup>3</sup> The fact that they choose not to make regular wholesale changes does not negate their authority to do so if they deem it necessary.

Over the past several years, the Board has held that "responsible direction" required "independent judgment," which meant more than judgment based solely on lengthy experience or training. Thus, for example, registered nurses were not supervisors when they utilized their own training and experience in deciding what actions to tell are subordinate to take *vis a vis* a patient.

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<sup>2</sup> In this regard, I reject Petitioner's contention that Bruce Albertson has sole authority to hire meat department employees. While Albertson appears to play an active role in staffing the meat department, the record does not offer any basis for concluding that the Tillamook meat manager has less authority with respect to hiring than other department managers, particularly inasmuch as Averill, who is also in Albertson's domain, has hiring authority.

<sup>3</sup> The seafood manager sets some hours in her own personal interest, rather than the Employer's interest, but she does have the authority to set hours, and does so.

This approach was resoundingly rejected by the Supreme Court in *NLRB v. Kentucky River Community Care, Inc.*, \_\_\_\_\_ U.S. \_\_\_\_\_ (May 29, 2001).

Lacking any new direction from the Board on how to interpret “responsible direction”, we are left with the “older” cases that preceded the health care amendments. These cases held that “independent judgment” is not restricted to judgments concerning complex matters. Rather, “independent” refers to the freedom of the alleged supervisor to make judgments -- complex or prosaic and uncomplicated -- independent of consultation with higher management. See *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989); *Holiday Inn of Dunkirk-Fredonia*, 211 NLRB 461 (1974). Moreover, while sporadic direction is insufficient, one need not exclusively “direct.” See, e.g., *Control Services, Inc.*, 305 NLRB 435 <sup>4</sup> (1991).

The mere ability/responsibility to ascertain deficiencies in hotel “maids’ work and to order corrections of same, is sufficient to show “responsible direction”. *Holiday Inn*, supra., at p. 462. Here, these managers appear to have the general responsibility to “run their shop” on a day-to-day basis without the close involvement of the food manager. There is no showing that he routinely prowls the departments and monitors their performance himself.

Accordingly, I conclude, on an independent basis, that the meat manager and the seafood manager are supervisors as defined in the Act, and exclude them from the Unit.

There are approximately 5 employees in the Unit.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board’s Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 555, AFL-CIO.

### **NOTICE POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting

requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon 97204, on or before July 20, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 27, 2001.

DATED at Seattle, Washington this 13<sup>th</sup> day of July 2001.

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